No. 85-1596

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1985

STEIN DISTRIBUTING CO., INC., APPELLANT

v.

UNITED STATES TREASURY DEPARTMENT, BUREAU OF ALCOHOL, TOBACCO AND FIREARMS

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION TO DISMISS

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QUESTION PRESENTED

Whether the court of appeals correctly affirmed an administrative finding that appellant, a wholesaler of alcoholic beverages, violated Section 5(b)(3) of the Federal Alcohol Administration Act, 27 U.S.C. 205(b)(3).

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OPINION BELOW

The opinion of the court of appeals (J.S. App. 1a-10a) is reported at 779 F.2d 1407.

JURISDICTION

The judgment of the court of appeals was entered on January 3, 1986. A notice of appeal to this Court was filed on March 10, 1986 (J.S. App. 87a-88a), and the appeal was docketed on March 28, 1986. Appellants attempt to invoke this Court's jurisdiction under 28 U.S.C. 1254(2). See pages 4-5, *infra*.

STATEMENT

1. Appellant Stein Distributing Co. distributes beer and wine in the Boise, Idaho area under permits issued by the Bureau of Alcohol, Tobacco and Firearms (BATF) and the State of Idaho. In 1979 the BATF learned that appellant

was providing extensive services to retailers in apparent violation of Section 5 of the Federal Alcohol Administration Act (FAA Act), 27 U.S.C. 205 which prohibits a wholesaler of alcoholic beverages from providing any "thing of value" to a retailer, subject only to "such exceptions as the Secretary of the Treasury shall by regulation prescribe," where the effect is exclusion of a competitor's product in interstate commerce. 27 U.S.C. 205(b)(3). J.S. App. 1a-2a, 12a.

Appellant initially denied providing prohibited services (J.S. App. 52a). Further BATF investigation revealed that appellant was supplying retailers with diagrams, or "schematic[s]," depicting appellant's view of how to allocate shelf space to beer and wine sold by appellant and its competitors, as well as the labor to clean and "reset" shelves and coolers according to the schematics. In the process, appellant routinely handled and removed its competitors' products and, in stores where its schematics were adopted, appellant's competitors' products were allocated less shelf space and were, in some cases, discontinued entirely. J.S. App. 1a, 31a-33a.

The BATF informed appellant late in 1979 and again early in 1981 that its conduct violated federal law to the extent that it resulted in the exclusion of competitive products. Appellant nevertheless continued to provide resetting and other services to retailers, ignoring BATF regulations that expressly withhold permission to "alter[] or disturb[]" products "purchased from other industry members," or to "rearrang[e] or reset[] * * * all or part of a store or liquor department." 27 C.F.R. 6.99. Finally, late in 1982, BATF served an order to show cause charging appellant with violating 27 U.S.C. 205(b)(3). Shortly thereafter, appellant ordered its employees to comply with federal law. J.S. App. 2a, 9a-10a.

After a full evidentiary hearing, an Administrative Law Judge determined that appellant had violated the FAA Act as charged (J.S. App. 38a-86a). The ALJ ordered appellant's permits suspended for 45 days. Appellant appealed to the Director of the BATF and argued that because Idaho law authorized resetting services, the Twenty-First Amendment rendered its conduct immune from regulation under the FAA Act. The Director ruled that appellant could comply with both state and federal law and that, since there was no conflict, there was no basis for holding federal law inapplicable (J.S. App. 22a-23a). The Director also ruled that, even if the Idaho statute and the FAA Act were deemed to conflict, federal law prevailed (*id.* at 23a). The Director concluded that appellant had willfully violated 27 U.S.C. 205(b)(3), but reduced appellant's suspension from 45 to 7 days, and affirmed the ALJ's decision as modified (J.S. App. 26a-37a).

2. The court of appeals affirmed (J.S. App. 1a-10a). It first addressed appellant's argument that, under the Twenty-First Amendment, the Idaho statute should shield appellant from federal law. The court noted that states have " 'virtually complete' control only over interests that engage the 'core powers' reserved to the states by the Twenty-First Amendment" (*id.* at 5a). The court stated that the Idaho statute did not involve a "core power[]" (*ibid.*), observing that recent decisions of this Court have held that state interests "more significant than those involved here were nevertheless not 'core powers' " (*ibid.*). The court added that the Idaho statute "is wholly permissive and merely exempts specific restocking activities from a strict state prohibition against wholesalers providing 'thing[s] of value' to retailers" (*ibid.*). It observed that the federal interests embodied in the FAA Act "should prevail over the less substantial state interest" (*id.* at 6a).

The court held that, in any event, the Twenty-First Amendment was "not implicated because there is no conflict between the Idaho and federal laws" (J.S. App. 6a). It repeated this Court's admonition that federal courts should avoid finding conflicts between state and federal law (*ibid.*). It concluded, as did the Director, that because the Idaho statute did "not *require* wholesalers" to provide resetting services, and because wholesalers could offer these services without necessarily violating the FAA Act, there was no conflict between Idaho and federal law (*id.* at 7a (emphasis in original)). The court also found that enforcement of the FAA Act would not frustrate the "purposes and objective[s]" of Idaho law. Because the "purposes and objectives" of the Idaho statute and the FAA Act were largely the same, it would be "incongruous" to hold that "the Idaho statute was intended to shield wholesalers" from the requirements of federal law (*id.* at 8a). Under such circumstances, the court concluded, "the statutes involved in this case do not conflict under * * * the Supreme Court's standards" (*id.* at 7a).[1]

ARGUMENT

1. This appeal should be dismissed for lack of jurisdiction under 28 U.S.C. 1254(2). There is jurisdiction under 28 U.S.C. 1254(2) only where a court holds a state statute

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[1]The court declined to follow two Fifth Circuit decisions relied on by appellant because they had "improperly applied the threshold conflict standard" adopted by this Court (J.S. App. 9a). It noted that the more recent of the two Fifth Circuit decisions frankly "acknowledged that the [earlier decision] had not applied the conflict test established by the Supreme Court" (*ibid.*).

The court of appeals also rejected appellant's contentions (1) that a violation of 27 U.S.C. 205(b)(3) requires conduct explicitly prohibited elsewhere in the FAA Act and (2) that appellant's violation was not "willful." The court found no support in either the plain language of the Act or its legislative history for appellant's restrictive interpretation of 27 U.S.C. 205(b)(3). It found adequate record support for the Director's determination that Stein had acted in "intentional disregard of the statute or plain indifference to its requirements." J.S. App. 9a-10a.

"invalid as repugnant to the Constitution * * * or laws of the United States." Contrary to appellant's claim (J.S. 2-3 n.1), the court of appeals did not invalidate any Idaho law. Rather, it held that "there is no conflict between the Idaho and federal laws" (J.S. App. 6a). Accordingly, the state "statute authorizing [appellant's conduct] was left untouched," and "the present appeal is not within [this Court's] § 1254(2) appellate jurisdiction." *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238, 247 (1984).[2]

2. If appellant's jurisdictional statement is treated as a petition for a writ of certiorari, 28 U.S.C. 2103, the petition should be denied. The court of appeals properly applied the standards set forth in this Court's recent decisions to conclude that there is no conflict between the FAA Act and Idaho law and that, therefore, appellant was required to comply with the federal law. Appellant's other claims are insubstantial and do not warrant further review.

a. Appellant's contention (J.S. 15) that the court of appeals adopted a "novel" theory of conflict is plainly wrong. This Court has consistently admonished federal courts to avoid "seeking out conflicts between state and federal regulation where none clearly exists." *Huron Portland Cement Co.* v. *City of Detroit*, 362 U.S. 440, 446 (1960). The court of appeals properly applied this Court's

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[2]See also, *e.g.*, *Burger King Corp* v. *Rudzewicz*, No. 83-2097 (May 20, 1985), slip op. 8 n.12 (jurisdiction under 28 U.S.C. 1254(2) is properly invoked "only where a court of appeals *squarely* has 'held' that a state statute is unconstitutional on its face or as applied") (emphasis in original); *Perry Education Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 42 (1983) (jurisdiction under 28 U.S.C. 1254(2) is lacking where portions of a collective bargaining agreement held invalid but state "statute authorizing such agreements is left untouched"). Should this Court conclude that the appeal is within its appellate jurisdiction, the court of appeals' decision should be affirmed for the reasons stated in the remainder of this submission.

preemption principles in the Twenty-First Amendment context, focusing on whether there is an "irreconcilable conflict between the federal and state regulatory schemes." *Rice* v. *Norman Williams Co.*, 458 U.S. 654, 659 (1982). It examined, first, whether appellant could comply with both federal and state law (J.S. App. 7a-8a); and second, whether, in light of the Twenty-First Amendment's unique accommodation of state interests, enforcement of federal law would frustrate the "purposes and objective[s]" of state law (J.S. App. 8a). See *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. at 248; *Pacific Gas & Electric Co.* v. *State Energy Resources Conservation and Development Comm'n*, 461 U.S. 190, 204 (1983).

The court of appeals' determination that there is no conflict between the FAA Act and Idaho law was manifestly correct. As the court of appeals found (J.S. App. 7a-8a)—and appellant does not dispute—appellant can comply with the FAA Act without violating Idaho law. It may even offer the services authorized under Idaho law without necessarily violating the FAA Act (*ibid.*). Where, as here, the regulatory prerogatives of both sovereigns can be honored, this Court has consistently declined to find a conflict. See, *e.g.*, *Pacific Gas & Electric Co.*, 461 U.S. at 218-219; *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 143 (1963).

Contrary to appellant's claim (J.S. 15-18), the court of appeals' conflict analysis did properly take into account the force of the Twenty-First Amendment. The decision below is fully consistent with two controlling decisions of this Court declining to find a conflict between federal law and state law enacted pursuant to the Twenty-First Amendment. In *Rice* v. *Norman Williams Co.*, 458 U.S. at 661-662, the Court held that there was no conflict where a state statute authorizes but "does not *require*" a seller of alcoholic beverages to engage in conduct that might violate

federal law (emphasis in original). And in *Joseph E. Seagram & Sons, Inc.* v. *Hostetter*, 384 U.S. 35, 45-46 (1966), the Court ruled that there is no conflict even where a state requires a seller of alcoholic beverages to engage in conduct that might violate federal law, for "the existence of such potential conflicts is entirely too speculative" to warrant preemption.[3]

The court of appeals also properly rejected appellant's claim that the FAA Act conflicted with Idaho law because it would frustrate the "purposes and objective[s]" of Idaho law. The court correctly found that the purposes and objectives of state and federal law in this area are largely the same (J.S. App. 8a). It concluded therefore that it would be "incongruous" to equate Idaho's determination, as a matter of state enforcement policy, not to prohibit certain activities with a legislative intent to insulate that conduct from challenge under the FAA Act when it violates federal law (*ibid.*).[4] This holding is consistent with well established

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[3]Appellant contends (J.S. 16) that because *Seagram* involved a state statute that "imposed a mandatory requirement * * * [it] presented no occasion for this Court to address the question whether a state statute expressly authorizing private conduct" might conflict with federal law. But if, as *Seagram* squarely held, state and federal law do not conflict where state law *requires* certain conduct, then necessarily there is no conflict where state law merely *authorizes* conduct that may or may not violate federal law. The Court's determination that there was no conflict between state and federal law in *Rice*—which appellant does not even cite—turned on precisely this point. See 458 U.S. at 661-662, 663-664.

[4]Idaho law is violated whenever an alcoholic beverage wholesaler provides any "thing of value" not "expressly permitted by" law to a retailer regardless of effect. See J.S. App. 18a, citing Idaho Code § 23-1033(1)(f)) (1977). It is thus a "strict liability" regulatory scheme—stricter than the FAA Act, which prohibits giving a "thing of value" to a retailer only if the result is exclusion of a competitor's product in interstate commerce. The legality of resetting services under Idaho law was perceived by state enforcement officals and industry members as a troublesome "gray area" in light of Idaho's stringent law; the statutory provision on which appellant relies was passed to clarify this gray area. Transcript of Hearing Before ALJ 100.

principles of federalism, see, *e.g.*, *Joseph E. Seagram & Sons*, 384 U.S. at 45 (in "areas of coincident federal and state regulation" courts should strive to avoid finding conflicts), and with this Court's recognition that a difference between federal and state laws governing an area of common regulatory concern is not tantamount to a conflict. *Exxon Corp.* v. *Governor of Maryland*, 437 U.S. 117, 132 (1978).

The liquor industry has long been subject to concurrent state and federal regulation, *William Jameson & Co.* v. *Morgenthau*, 307 U.S. 171, 172-173 (1939) (summarily rejecting contention that FAA Act unconstitutional under Twenty-First Amendment), and Congress "plainly retains authority under the Commerce Clause to regulate" interstate commerce in liquor. *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 713 (1984). The court of appeals correctly applied controlling precedent in concluding that appellant can and should comply with both state and federal law.[5]

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[5]Appellant argues (J.S. 11-14, 19-21) that the court of appeals' decision warrants review because it is inconsistent with *Wine Industry of Florida, Inc.* v. *Miller*, 609 F.2d 1167 (5th Cir. 1980), and *Castlewood International Corp.* v. *Simon*, 596 F.2d 638 (5th Cir. 1979), vacated and remanded, 446 U.S. 949, reinstated, 626 F.2d 1200 (5th Cir. 1980) (per curiam). Those cases invalidated BATF limitations that purportedly conflicted with state law. The court of appeals properly discounted those decisions (J.S. App. 8a-9a). As the court recognized (and appellant neglects to mention), the Fifth Circuit openly acknowledged in *Wine Industry* that *Castlewood*, while binding as Circuit precedent, did not properly apply this Court's conflict standards. See *Wine Industry*, 609 F.2d at 1171-1172. Under these circumstances, any inconsistency between the present case and those decisions is insubstantial and does not merit this Court's review. Cf. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957). Indeed, *Castlewood*'s days in the Fifth Circuit may well be numbered in view of the recent decisions of this Court (viz., *Silkwood; Pacific Gas & Electric,*) and the decision below, which make it clear that *Castlewood's* analysis of the conflict issue was deficient. If the Fifth Circuit decides to adhere to *Castlewood* in a future case, certiorari might then be appropriate to review that decision.

b. Because there is no conflict between the FAA Act and Idaho law, appellant's arguments (J.S. 9-14) about states' "core powers" under the Twenty-First Amendment are irrelevant. See, *e.g., Rice*, 458 U.S. at 662-663 n.9; *United States* v. *Frankfort Distilleries*, 324 U.S. 293, 299 (1945). Even if there were a conflict, however, the court of appeals was correct in its alternative holding that Idaho's decision not to prohibit and punish certain activities was not an exercise of Twenty-First Amendment "core power" sufficient to justify invalidation of the FAA Act (J.S. App. 4a-6a).

Although the Twenty-First Amendment grants a state broad authority to "restrict, regulate, or prevent the traffic and distribution of intoxicants" (*Hostetter* v. *Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 330 (1964)), it is clear that "important federal interests in liquor matters survived the ratification of the Twenty-First Amendment." *California Liquor Dealers Ass'n* v. *Midcal Aluminum Co.*, 445 U.S. 97, 108 (1980). Indeed, this Court has never held that a state law regulating alcoholic beverages preempted a validly enacted federal statute. See *Frankfort Distilleries*, 324 U.S. at 299; cf. *Carter* v. *Virginia*, 321 U.S. 131, 137 (1944). And it has twice recently rejected such claims involving state policies far more substantially related to "core power" concerns than the Idaho statute at issue in this case. In *Capital Cities Cable, Inc.* v. *Crisp, supra*, the Court held that a federal regulation prevailed over a state law designed to promote temperance by prohibiting liquor advertising. In *Bacchus Imports, Ltd.* v. *Dias*, No. 82-1565 (June 29, 1984), the Court concluded that Commerce Clause considerations alone compelled invalidation of a state statue that sought to protect the vitality of the state's own wine industry.

In light of *Bacchus* and *Capital Cities*, appellant's contention that the Idaho statute involved here involves an exercise of Idaho's "core power" because it relates to the "structure [of] the liquor distribution system" (J.S. 9) is, at best, a play on words. If appellant's view of what constitutes an exercise of "core power" is correct, the Twenty-First Amendment would render the FAA Act unenforceable except in those states where state law and the FAA Act were identical. That contention was summarily rejected in *William Jameson & Co.* v. *Morgenthau*, 307 U.S. 171, 172-173 (1939), and appellant's invitation to revisit this issue should be declined.

c. Appellant's arguments (J.S. 21-25) that the FAA Act does not reach the conduct involved here, and that the decision below conflicts with the decision in *National Distributing Co.* v. *U.S. Treasury Dep't*, 626 F.2d 997 (D.C. Cir. 1980), are insubstantial.

Appellant concedes (J.S. 22) that construction of a statute must begin with its language but then proceeds to ignore the plain language of 27 U.S.C. 205(b)(3). The language of that Section, however, is straightforward and broad: it prohibits a wholesaler from "furnishing, giving, renting, lending or selling * * * any equipment, fixtures, signs, supplies, money, services, or" any "other thing of value" to a retailer, subject to such "exceptions as the [BATF] shall by regulation prescribe." The conduct engaged in by appellant was not authorized under the applicable BATF regulations, and it clearly violated 27 U.S.C. 205(b)(3). Appellant's disagreement with the scope of a statute that is plain on its face is not an issue that warrants this Court's review. See *United States* v. *Rodgers*, 466 U.S. 475 (1984).

Finally, there is no conflict between this case and the D.C. Circuit's *National Distributing* decision. *National Distributing* invalidated a BATF ruling that sought to

regulate the pricing policies of wholesalers. 626 F.2d at 1019-1020. In holding that the BATF had acted beyond its authority in promulgating the ruling, the court relied on explicit legislative history establishing that Congress intended to foreclose the BATF from regulating prices under the FAA Act. See 626 F.2d at 1011-1012. Whatever the merits of that decision, therefore, it is readily distinguishable from this case. Appellant points to nothing in the FAA Act or its legislative history suggesting that the statute means anything other than what it says, or that Congress intended courts to second-guess the BATF on a case-by-case basis as to what conduct should be exempted from 27 U.S.C. 205(b)(3).

CONCLUSION

For the reasons stated above, the appeal should be dismissed for lack of jurisdiction; if the jurisdictional statement is treated as a petition for a writ of certiorari, the petition should be denied.

Respectfully submitted.

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